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RECENT DECISIONS

SEARCH AND SEIZURE—AIRPORT DRUG SEIZURES: HOW THE FEDERAL COURTS STRIKE THE FOURTH AMENDMENT BALANCE

The fourth amendment¹ forbids unreasonable seizures. In *Terry v. Ohio*,² the Supreme Court of the United States recognized that seizures are not inherently unreasonable.³ Moreover, the Court stated that not all interactions between the police and citizens are seizures within the meaning of the fourth amendment.⁴

In *Terry*, the Supreme Court allowed a limited government intrusion on an individual's privacy, justified by a standard less rigorous than probable cause.⁵ This decision, which resulted from a careful balancing process, has evolved into the reasonable suspicion standard.⁶ The general governmental interests included the prevention and detection of crime, as well as the interest of the police in protecting themselves and other potential victims from violence.

1 "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

2 392 U.S. 1 (1968).

3 The court said in *Terry*:

[w]e have recently held that "the Fourth Amendment protects people, not places," and wherever an individual may harbor a reasonable "expectation of privacy," he is entitled to be free from unreasonable governmental intrusion. Of course, the specific content and incidents of this right must be shaped by the context in which it is asserted. For "what the Constitution forbids is not all searches and seizures, but unreasonable searches and seizures."

Id. at 9 (citations omitted).

4 "Obviously, not all personal intercourse between policemen and citizens involves 'seizures' of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." *Id.* at 19 n.16.

The word "citizen" as used in *Terry*, and this commentary, refers not only to United States' citizens but to any individual who may come into contact with a police officer.

5 The Court provided the following "objective standard" by which to judge whether a particular intrusion was reasonably justified: "would the facts available to the officer at the moment of the seizure . . . 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?" *Id.* at 21-22.

6 The Court said, as a general proposition, it is necessary "first to focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen," for there is "no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails." *Id.* at 20-21 (quoting *Camara v. Municipal Court*, 387 U.S. 523, 534-35 (1967)).

These societal interests were weighed against the personal privacy interest invaded by a protective search for weapons.⁷ The Court determined the societal interests to be paramount.

Since *Terry*, the Supreme Court has continued to develop the reasonable suspicion standard.⁸ Fourth amendment cases currently focus on weighing the government's law enforcement interests against the people's liberty interests.⁹ The reasonable suspicion standard and its concomitant balancing process need not come into play, however, until an individual has been "seized" by a government official. In *Terry*, the Supreme Court did not have to rule on the precise point in time at which the "seizure" occurred.¹⁰ In a number of recent cases involving airport narcotics investigations, however, determining the moment of seizure has become significant.

This commentary analyzes the federal courts' development of the seizure concept in decisions involving police-citizen contacts in airport settings.¹¹ Part I examines the United States Supreme Court's

7 The Court nonetheless observed that a "protective search for weapons . . . constitutes a brief, though far from inconsiderable, intrusion upon the sanctity of the person." *Id.* at 26.

8 See *Brown v. Texas*, 443 U.S. 47 (1979); *Delaware v. Prouse*, 440 U.S. 648 (1979); *Pennsylvania v. Mimms*, 434 U.S. 106 (1977); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975).

9 For example, in *Mimms*, the Court determined that the government's interest in police officers' safety outweighed the invasion of personal liberty resulting from compliance with an officer's order that the driver get out of his car. The Court characterized this invasion of liberty as de minimis. See 434 U.S. at 111. Compare the Court's balancing process in *Brown*, which weighed in favor of the individual's freedom from police interference absent justifiable suspicion of criminal activity. In *Brown*, two police officers had stopped the defendant in an alley and demanded to see his identification without any specific basis for believing that he had committed a crime. See 443 U.S. at 52.

10 After holding that *Terry* was clearly "seized" when Officer McFadden grabbed him, the Court noted: "[w]e thus decide nothing today concerning the constitutional propriety of an investigation 'seizure' upon less than probable cause for purposes of 'detention' and/or interrogation." 392 U.S. at 19 n.16.

11 There are numerous commentaries on the *Terry* decision and related fourth amendment Supreme Court decisions. See generally Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349 (1974); Caracappa, *Terry v. Ohio and the Power of Police to Accost Citizens Absent Probable Cause to Arrest: A Critical Look at the Pennsylvania Experience*, 16 DUQ. L. REV. 499 (1977-1978); LaFave, "Street Encounters" and the Constitution: *Terry, Sibron, Peters, and Beyond*, 67 MICH. L. REV. 40 (1969); Miles, *From Terry to Mimms: The Unacknowledged Erosion of Fourth Amendment Protections Surrounding Police-Citizen Confrontations*, 16 AM. CRIM. L. REV. 127 (1978); O'Brien, *Reasonable Expectations of Privacy: Principles and Policies of Fourth Amendment-Protected Privacy*, 13 NEW ENG. L. REV. 662 (1978).

Other commentaries which discuss the application of the fourth amendment to searches and seizures based on less than probable cause include: Costantino, Cannavo, & Goldstein, *Drug Courier Profiles and Airport Stops: Is the Sky the Limit?*, 3 W. NEW ENG. L. REV. 175 (1980); Note, *Drug Courier Profile Stops and the Fourth Amendment: Is the Supreme Court's Case of Confusion in its Terminal Stage?*, 15 SUFFOLK U. L. REV. 217 (1981); Comment, *Reformulating Seizures—Airport Drug Stops and the Fourth Amendment*, 69 CALIF. L. REV. 1486 (1981); Comment, *State v.*

development of the seizure concept; Part II discusses the cases applying this seizure law in the United States Courts of Appeals; and Part III reexamines the Supreme Court's seizure teaching in light of these recent decisions.

I. The Supreme Court and The Seizure Concept

Several years ago the Drug Enforcement Administration (DEA) established airport surveillance programs aimed at detecting and intercepting drug couriers. Typically, DEA agents have little time to gather evidence or establish probable cause to arrest suspects who pass through the nation's international airports. Thus, the airport encounters between the police and suspects present timely fourth amendment questions. In *United States v. Mendenhall*,¹² the Supreme Court considered for the first time whether a police officer's conduct in approaching a suspected drug courier and requesting his identification constitutes a fourth amendment seizure requiring objective justification.¹³ While the Supreme Court failed to reach a consensus on the seizure issue, two justices suggested a "reasonable person test" which attempts to clarify many of the seizure questions left unanswered by *Terry* and its progeny.

Reid: Airport Searches and the Drug Courier Profile in Georgia, 33 MERCER L. REV. 433 (1981); Comment, *United States v. Mendenhall—DEA Airport Search and Seizure*, 16 NEW ENG. L. REV. 597 (1980-1981); Comment, *Drug Trafficking at Airports—The Judicial Response*, 36 U. MIAMI L. REV. 91 (1981); Comment, *Mendenhall and Reid: the Drug Courier Profile and Investigative Stops*, 42 U. PITT. L. REV. 835 (1981); Comment, *Criminal Profiles After United States v. Mendenhall: How Well Founded a Suspicion?*, 1981 UTAH L. REV. 557 (1981).

This recent decisions article will not replot ground already tilled by the above publications. Instead, it will focus on how recent federal decisions have impacted upon the seizure test set out in *United States v. Mendenhall*, 446 U.S. 544 (1980). This commentary will analyze how that general test is being solidified by case law development in the Courts of Appeal and how these decisions relate to the basic rationale behind that standard.

12 446 U.S. 544 (1980).

13 The *Mendenhall* facts illustrate the type of confrontation that frequently occurs in airports between police officers and drug courier suspects. Two DEA agents monitoring passengers arriving at Detroit Metropolitan Airport observed the defendant disembark from a Los Angeles flight. According to the agents, the defendant's behavior fit the "drug courier profile," an informal compilation of traits normally associated with persons who transport illegal narcotics. The officers approached the defendant, identified themselves as federal agents, and asked to see her identification and airline ticket. Mendenhall produced a driver's license in her correct name and an airline ticket issued in the name of "Annette Ford," a name she told the agents she "just felt like using." One of the officers then identified himself specifically as a narcotics agent, which caused Mendenhall to become visibly "shaken" and extremely "nervous." The agent returned Mendenhall's ticket and license and asked if she would go with him to the airport DEA office for further questioning. Mendenhall accompanied the agent to his office, where she eventually consented to a strip search which revealed two small packages hidden in her undergarments, one of which appeared to contain heroin. *Id.* at 547-49.

Relying heavily on *Terry*, Justice Stewart, joined by Justice Rehnquist, stated that "a person has been seized within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."¹⁴ Through this reasonable person test, Justice Stewart attempted to construct a scale on which the courts could balance the competing governmental and liberty interests in any given police-citizen encounter. Justice Stewart acknowledged the need for police contact with the public "as a tool in the effective enforcement of criminal laws."¹⁵ Yet he also recognized the fourth amendment values involved in airport investigations, and he gave examples of circumstances which would support a conclusion that a person has been "seized" in an airport encounter under the reasonable person analysis.¹⁶

Justice Stewart concluded that no seizure occurred in *Mendenhall* and considered the following factors determinative: (1) the encounter took place in a public concourse; (2) the agents neither wore uniforms nor displayed weapons; (3) the agents did not summon the respondent to their presence, but instead approached her and identified themselves as federal agents; and (4) the agents requested rather than demanded to see the respondent's identification and airline ticket. Justice Stewart noted that "such conduct, without more, did not amount to an intrusion upon any constitutionally protected interest."¹⁷

Justice Powell, joined by Chief Justice Burger and Justice Blackmun, concurred in the *Mendenhall* judgment but refused to consider the initial seizure question since it had not been raised in the lower court.¹⁸ Rather, Justice Powell assumed that a seizure had occurred

¹⁴ *Id.* at 554.

¹⁵ *Id.*

¹⁶ Even if the suspect did not attempt to leave, the following circumstances might nevertheless indicate a seizure: (1) the threatening presence of several officers; (2) an officer displaying a weapon; (3) some physical touching of the citizen; (4) a tone of voice or use of language which implies that compliance with the officer's request might be compelled. "In the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person." *Id.* at 554-55.

¹⁷ "The respondent was not seized simply by reason of the fact that the agents approached her, asked her if she would show them her ticket and identification, and posed to her a few questions." *Id.* at 555.

¹⁸ Justice Powell noted that he did not "expressly disagree" with Justice Stewart's conclusion on the seizure issue, but he indicated that the question of whether *Mendenhall* would reasonably feel free to leave when asked to produce her ticket and identification was "extremely close." *Id.* at 560 n.1 (Powell, J., concurring).

at the initial contact and concluded that it was justified given the agents' reasonable suspicion. Once again, Justice Powell used a balancing analysis similar to the approach employed by the Court in *Terry*. He stated that fourth amendment jurisprudence requires considering the need for effective law enforcement along with each citizen's constitutional protection against unreasonable searches and seizures.¹⁹

Like the concurring Justices in *Mendenhall*, the dissenting Justices Brennan, Marshall and Stevens, assumed that a seizure had occurred at the initial contact.²⁰ Unlike the concurring Justices, however, the dissenters believed that the agents lacked specific and articulable grounds upon which to justify the seizure.²¹ For them, the defendant's fourth amendment rights outweighed the government's law enforcement interests. Thus, the agents' "seizure" of *Mendenhall* was unreasonable.²²

The United States Supreme Court once again considered the constitutionality of airport drug stops in *Reid v. Georgia*.²³ Holding that the agent lacked sufficient justification for making the seizure, the Court reversed *Reid*'s conviction.²⁴ Only Justice Rehnquist would have upheld the conviction by following Justice Stewart's opinion in *Mendenhall*.²⁵ While refusing to address the seizure issue, since it had not been litigated at the trial level, Justice Powell noted

19 He added: "[t]he careful and commendable police work that led to the criminal conviction at issue in this case satisfies the requirements of the Fourth Amendment." *Id.* at 565-66 (Powell, J., concurring).

20 Justice White criticized the Stewart opinion for reversing the judgment of the court of appeals on the basis of a fact-bound standard which the defendant did not litigate in the lower court. *Id.* at 570-71 (White, J., dissenting).

21 The dissent challenged the government's reliance in this case on the drug courier profile as insufficient in itself to establish reasonable suspicion to justify the initial seizure. *See id.* at 572-73 (White, J., dissenting).

22 "Because Agent Anderson's suspicion that Ms. *Mendenhall* was transporting narcotics could be based only on 'his inchoate and unparticularized suspicion or "hunch,"' rather than 'specific reasonable inferences which he is entitled to draw from the facts in light of his experience,' he was not justified in 'seizing' Ms. *Mendenhall*." *Id.* at 573 (citations omitted) (White, J., dissenting).

23 448 U.S. 438 (1980) (per curiam). In *Reid*, a DEA agent had approached two suspects whose behavior fit the drug courier profile. The agent identified himself and asked to see the men's airline tickets and identification. According to the agent, the two men appeared nervous during this initial encounter. In response to the agent's request, the two men consented to accompany the agent inside the terminal for a search of their shoulder bags and their persons. Once inside the terminal, however, the defendant abandoned his bag and began to run. The bag was later found to contain cocaine. *Id.* at 439.

24 Five Justices joined the *per curiam* opinion—the four dissenters in *Mendenhall* and Justice Stewart.

25 *See Reid*, 448 U.S. at 442 (Rehnquist, J., dissenting).

in his concurring opinion that the seizure question remains open for future courts to consider, "in light of the opinions [expressed] in *Mendenhall*." The Court has not decided a factually similar airport seizure case since *Reid*.²⁶

II. Recent Airport Seizure Cases in the Federal Courts

When considering airport seizure cases, most United States Courts of Appeals explicitly note that the reasonable person test does not bind them since there is no definitive Supreme Court guidance on the issue.²⁷ Nonetheless, the Courts of Appeals which have de-

²⁶ *Id.* at 442-43 (Powell, J., concurring).

Since *Reid*, the Supreme Court has granted certiorari and heard the arguments in an airport narcotics case from the Florida courts: *Royer v. State*, 389 So.2d 1007 (Fla. Dist. Ct. App. 1980), *cert. granted*, 102 S.Ct. 631 (1981). See Addendum preceding note 68 *infra*. In *Royer*, the defendant was approached by two plainclothes officers, who identified themselves and asked to talk with Royer. The officers then asked to see Royer's airline ticket and some other identification. Royer complied with both requests. There was a discrepancy between the names on the ticket and the driver's license. The officers then told the defendant that they were narcotics officers and that they suspected him of transporting narcotics. Royer became markedly nervous. Next, the officers asked Royer to accompany them to an adjacent room. They did not tell Royer that he did not have to consent to their requests. The officers retrieved the bags Royer had just checked and carried them about forty feet from the initial encounter to a small office. Once in the "interrogation room," and still in the possession of Royer's identification and plane ticket, the officers asked Royer if he would consent to a search of both bags. Saying nothing, Royer produced a key and unlocked one of the suitcases, which contained marijuana. Royer agreed to let one of the officers pry open the other bag with a screwdriver. The second bag also contained a large amount of marijuana. 389 So. 2d at 1009, 1016-18.

The Florida District Court of Appeal, sitting *en banc*, held that "[f]or all practical purposes, Royer had been placed under arrest when the alleged consent was given." *Id.* at 1019. Finding that the officers did not have probable cause for this "arrest," the court reversed Royer's conviction and directed that he be discharged. In reaching this decision the Florida District Court of Appeal noted that the *Royer* facts were "decisively different" from those in *Mendenhall*. *Id.* at 1018 n.7. Additionally, the court declined to decide whether a fourth amendment seizure occurred in *Royer* prior to the defendants "arrest." *Id.* at 1018 n.8.

As it was not central to the Florida court's decision, the U.S. Supreme Court may not deal with the seizure question in the *Royer* case. However, the seizure issue did come up during the oral arguments. Justice White asked defense counsel Theodore Klien whether the citizen's reasonable belief under the circumstances should be the deciding factor for determining whether a fourth amendment seizure had occurred:

Klien: "I don't think it should, but that's what this court has said."

Justice White: In what case in which five justices agreed?

Justice Stevens: That test was formulated in the lead opinion in *Mendenhall*, in which only two Justices joined." *Argument Before United States Supreme court in Royer v. State*, No. 80-2146, 32 CRIM. L. REP. 4069 (Oct. 12, 1982).

It is significant to note that Justice Stewart, the author of the reasonable person test in *Mendenhall*, is no longer on the bench. Thus, the Supreme Court may decide to comment on the seizure issue in *Royer*.

²⁷ See *United States v. Berry*, 670 F.2d 583 (5th Cir. Unit B 1982); *United States v. Lara*,

cided airport seizure questions have usually adopted the reasonable person test.²⁸ Given the paucity of Supreme Court direction on the matter, however, they rely on and are bound by precedent in their particular circuits.²⁹ Since airport seizures have only recently risen in importance, the amount of precedent in any given circuit is minimal.³⁰ Thus, a court must often either analogize to other fourth amendment cases or consider case law from other circuits.³¹

While a few courts have engaged in a more eclectic analysis of factors,³² most courts have focused primarily on the police officer's conduct and whether it amounts to such a show of authority that a reasonable person would not feel free to leave. Frequently, seemingly minor gradations in the degree of coercion exerted by a police officer will differentiate a seizure from a nonseizure.³³ The remainder of

638 F.2d 802 (5th Cir. Unit B 1981); *United States v. Black*, 675 F.2d 129 (7th Cir. 1982); *United States v. Setzer*, 654 F.2d 354 (5th Cir. Unit B 1981); *United States v. Berd*, 634 F.2d 979 (5th Cir. Unit B 1981); *United States v. Robinson*, 625 F.2d 1211 (5th Cir. 1980).

28 *United States v. Harrison*, 667 F.2d 1158 (4th Cir. 1982); *United States v. Lara*, 638 F.2d 802 (5th Cir. Unit B 1982); *United States v. Black*, 675 F.2d 129 (7th Cir. 1982); *United States v. Elsoffer*, 671 F.2d 1294 (11th Cir. 1982); *United States v. West*, 651 F.2d 71 (1st Cir. 1981); *United States v. Smith*, 649 F.2d 305 (5th Cir. Unit B 1981); *United States v. Anderson*, 663 F.2d 934 (9th Cir. 1981).

29 *Berry*, 670 F.2d at 593.

30 *See generally Black*, 675 F.2d at 129.

31 *Black*, 675 F.2d at 131.

32 In *Black*, the Seventh Circuit stated that the seizure inquiry should focus on three major areas: "(1) the conduct of the police; (2) the person of the individual citizen; and (3) the physical surroundings of the encounter." *Id.* at 134.

33 The standard of review which the appellate court applies in examining the trial record seems highly significant given the fact-bound nature of the reasonable person test. Disagreement exists as to the amount of deference which an appellate court must give to the trial court's findings on the seizure issue. In *United States v. Patino*, 649 F.2d 724, 728 (9th Cir. 1981) the Ninth Circuit noted, "[t]he determination of when such a contact constitutes a seizure within the meaning of the fourth amendment depends upon the facts and circumstances of each case." *Patino* concluded that since the seizure question turns largely on factual issues, proper deference should be given to the trial court judge who heard the testimony and his findings should not be reversed unless clearly erroneous. *Id.*

However, in *United States v. Black*, 675 F.2d 129, 138-39 (7th Cir. 1982), Justice Swygert, in dissent, challenged the application of the clearly erroneous standard of review. As Justice Swygert pointed out, in determining whether or not a reasonable person would feel free to leave "[t]he factual findings . . . [most frequently] are not in dispute." *Id.* at 138. Where the facts are uncontested, the determination of whether or not an individual has been seized is a legal one, and an appellate court may exercise independent judgment in entering its own conclusions of law. *See* 2 Fed. Proc., L. Ed. § 3:652 (1981).

Despite Justice Swygert's arguments, however, most appellate courts have applied a clearly erroneous standard of review. This choice is significant given the inherently factual orientation of the reasonable person test. Courts have acknowledged that a determination of whether or not a reasonable person would feel free to leave often calls for a "refined judgment." The application of a more stringent standard of review, however, impedes their abil-

this part focuses on the various categories of police conduct which the Courts of Appeals have examined in deciding the seizure question. The analysis reviews the factual circumstances which most often receive close judicial scrutiny, and examines these fact patterns in a chronological order roughly corresponding to their occurrence in airport stop situations.

A. *The Initial Encounter*

The degree of restraint which a police officer imposes upon a suspect's freedom of movement is a highly relevant factor in determining whether or not a seizure has occurred.³⁴ While under Justice Stewart's reasonable person standard a police officer can approach a suspect for questioning, he cannot introduce any element of force or coercion. A citizen need not be held at gunpoint or under actual physical restraint in order for a seizure to arise.³⁵ Rather, a seizure has been found where the officer's authoritative manner indicates that the person is not free to leave.³⁶ Thus, where the officer directly blocks the suspect's path and impedes his movement through the concourse, a seizure has occurred which must be justified by reasonable and articulable suspicion.³⁷ Similarly, an initial encounter involving the threatening presence of several officers creates an environment in which a reasonable person would not feel free to leave.³⁸

ity to make this refined judgment and has constrained their ability to fully delineate a precise seizure test.

During oral argument for *Royer*, the U.S. Supreme Court considered the controversy over the degree of deference which an appellate court must grant a lower court's findings on the seizure issue. The Supreme Court's decision in *Royer* should provide some guidance on the correct standard of review to apply in these cases. See Addendum preceeding note 68 *infra*.

34 *United States v. Black*, 675 F.2d 129 (7th Cir. 1982); *United States v. Berry*, 670 F.2d 583 (5th Cir. Unit B 1982); *United States v. Bowles*, 625 F.2d 526 (5th Cir. 1980); *United States v. Elmore*, 595 F.2d 1036 (5th Cir. 1979); *United States v. Robinson*, 535 F.2d 881 (5th Cir. 1976).

35 *Black*, 675 F.2d at 134. See also *Elmore*, 595 F.2d at 1041.

36 "[I]f officers have intimidated an individual through the use of a show of authority sufficient to make it apparent that the individual is not free to ignore the officer and proceed on his way, a seizure will be found." *Black*, 675 F.2d at 134-35.

37 *Bowles*, 625 F.2d 526. In *Bowles*, a DEA agent approached Bowles who was walking ahead of him at a pace "just short of a run." The agent pursued and passed Bowles, held out his credentials, and turned to face the defendant. The agent stood directly in Bowles's path, thus preventing him from proceeding further. The Fifth Circuit held that this action constituted a seizure since the agent had placed a restraint on Bowles's movement.

38 In *United States v. Anderson*, 663 F.2d 934 (9th Cir. 1981), a DEA agent had received a tip from a confidential informant that a private aircraft containing narcotics had left Florida and would be arriving at the Orange County airport. When the defendant's plane arrived at the airport, several DEA agents and uniformed police officers were on hand to meet

Under these circumstances, the officer's coercive conduct amounts to a substantial intrusion upon the citizen's liberty interests which outweighs the government's interest in law enforcement. Courts have concluded that such coercive conduct constitutes a seizure which must be based on constitutional justification.

B. *The Questioning Phase*

Even where no physical restraint occurs at the initial contact, a seizure may arise as a result of the officer's coercive questioning.³⁹ When the court analyzes this phase of the encounter, the seizure determination often turns on such nuances as the tone of the officer's voice and the nature of the questions asked.⁴⁰ If the officer phrases his questions in a conversational tone⁴¹ and requests but does not demand to speak with the citizen, the courts may characterize the encounter as a non-seizure.⁴² But if the officer makes an offensive or threatening request, such as approaching the citizen and immediately asking that he follow the officer to an office, the presumption arises that a reasonable person would not feel free to leave.⁴³

Courts accept this approach noting that a reasonable person

it. Two of the agents asked permission to board the plane and a third agent asked the defendant to accompany him to a nearby aviation building where they could talk. The defendant agreed to do so, and he and his companions walked to the aviation building followed by DEA agents carrying his luggage. Once inside, the defendants were constantly in the presence of at least one agent or officer, even during trips to use the restroom or telephone.

Applying Justice Stewart's reasonable person test, the Ninth Circuit held that a seizure had occurred, if not on the plane, then within the aviation building. The court noted that the presence of five DEA agents and five uniformed police officers was one factor indicating that a reasonable person would not have felt free to leave.

Similarly, in *International Ladies' Garment Workers' v. Sureck*, 681 F.2d 624 (9th Cir. 1982), the Ninth Circuit applied the reasonable person test to Immigration and Naturalization Service factory searches for illegal aliens to find that the authoritative presence of several agents had produced a seizure. In addition, the court found the following aspects of the agent's behavior relevant to the seizure question: 1) their general method of conducting the survey; 2) their verbal announcement of authority; 3) their display of badges; 4) their positioning near factory exits; and 5) their open display of handcuffs.

39 *United States v. Black*, 675 F.2d 129 (7th Cir. 1982); *United States v. Berry*, 670 F.2d 583 (5th Cir. Unit B 1982); *United States v. Wylie*, 569 F.2d 62 (D.C. Cir. 1977).

40 *Wylie*, 569 F.2d at 68; *Black*, 675 F.2d at 135; *Berry*, 670 F.2d at 596.

41 *Berry*, 670 F.2d at 596.

42 *Wylie*, 569 F.2d at 68.

43 In *United States v. Jefferson*, 650 F.2d 854 (6th Cir. 1981), a DEA agent stopped the defendant and immediately after identifying himself, requested that the defendant accompany him to an airport office. The court held that the agent "did not merely stop Jefferson to ask him a few questions; he stopped him and immediately after identifying himself as a DEA agent requested Jefferson to accompany him to the baggage claims office. In these circumstances, Jefferson could not reasonably believe that he was free to leave." *Id.* at 856.

often elects to speak with a police officer more out of a spirit of cooperation than a feeling of compulsion or fear.⁴⁴ However, as one commentator has noted, this explanation does not seem to be the true rationale behind the court's reasoning.⁴⁵ Courts more likely tolerate the de minimis intrusion or inconvenience caused by the officer's in-offensive questioning to further the government's overriding interest in effective law enforcement. As long as the police officer does not threaten or coerce the citizen, courts have justified the questioning as an essential tool of law enforcement.⁴⁶

The more difficult problem has been whether a seizure occurs when the officer's questions focus directly on the citizen.⁴⁷ A reasonable person would feel more intimidated or coerced knowing that he is the subject of a police investigation.⁴⁸ Nevertheless, the mere fact that the officer's questions focus on the citizen does not, by itself, give rise to a fourth amendment intrusion.⁴⁹ When the officer's questions become focused to the extent of being intimidating or accusatory, however, a possible watershed point in the seizure analysis may have been reached.⁵⁰ For example, statements by the officer that he suspects the citizen of smuggling drugs,⁵¹ or that an innocent person would consent to a search,⁵² may transform this otherwise innocuous encounter into an unjustified seizure.⁵³

C. *The Request for Identification*

Assuming the agent's initial questioning is not so coercive or focused as to constitute a seizure, one particular aspect of the questioning—a request for identification—may cause the encounter to become a seizure. In virtually all airport drug cases, the agent asks for identification from the person with whom he is speaking. The authority to ask for identification is important. A discrepancy between the name on a plane ticket and a driver's license, combined

44 *Gomez v. Turner*, 672 F.2d 134, 142 (D.C. Cir. 1982); *United States v. Ramirez-Cifuentes*, 682 F.2d 337, 346 (2d Cir. 1982) (Lumbard, C.J. concurring).

45 W. LaFave, a leading authority in criminal law noted, "It is nothing more than a fiction to say that all of these suspects have consented to the confrontation." W. LAFAVE, 3 SEARCH AND SEIZURE § 9.2 (1978).

46 *Id.* § 9.2, at 55.

47 *Gomez*, 672 F.2d at 143; *Berry*, 670 F.2d at 597.

48 *Patino*, 649 F.2d at 727 (9th Cir. 1981); *Black*, 675 F.2d at 139 (Swygert, J., dissenting).

49 *Gomez*, 672 F.2d at 143.

50 *Berry*, 670 F.2d at 597.

51 *Robinson*, 625 F.2d at 1217.

52 *Setzer*, 654 F.2d at 358.

53 *Berry*, 670 F.2d at 597.

with other articulable facts, is often sufficient grounds to allow the officer to make an investigatory stop.⁵⁴

A request for identification during noncoercive questioning does not constitute a seizure per se.⁵⁵ However, the officer either retaining an identification document for a lengthy period of time, or asking the suspect to consent to a search while the officer holds the requested identification, may constitute a seizure. When an officer unnecessarily retains either a driver's license or an airplane ticket, courts find that the person could not feel free to leave and is thus seized under the reasonable person test.⁵⁶ Document retention and freedom of movement are simply inconsistent, and the individual's liberty interest prevails in that situation.⁵⁷

Even if the officer holds the piece of identification for only a short time, requesting the suspect to consent to a search while the officer has the driver's license or airline ticket may also constitute a seizure. The court will consider whether the suspect, deprived of a license or travel papers, could reasonably believe from the officer's search request that the investigation was so focused upon him that he was not free to leave. Thus, a seizure might occur even when the officer does not retain the identification for an extended time period.⁵⁸

The Courts of Appeals scrutinize the identification request and production process very closely.⁵⁹ License or ticket retention is probably the most frequently cited point at which a seizure occurs in air-

54 *United States v. Black*, 675 F.2d 129 (7th Cir. 1982); *United States v. Herbst* 641 F.2d 1161 (5th Cir. Unit B 1981).

55 *Gomez*, 672 F.2d at 142; *Black*, 675 F.2d at 136. In *Gomez*, the court stated that "the nature of this question alone without reference to the demeanor of the officer, the tone of voice used, or any other circumstance, cannot convert an otherwise inoffensive encounter into a seizure." However, if the attendant circumstances indicate coercion, the identification question could sufficiently impair freedom to leave and would constitute a seizure. *Gomez*, 672 F.2d at 142.

56 *Elsoffer*, 671 F.2d at 1297. Retention of either the ticket or driver's license may violate the reasonable person test. First, if a person is waiting to board an outgoing flight, police retention of his airplane ticket alone is a patent infringement on free movement. *Id.* Second, whenever a person is deprived of a driver's license, his mobility is restricted because one could never freely abandon such an important document. *United States v. Viegas*, 637 F.2d 42, 44 n.3 (1st Cir. 1981); *United States v. Black*, 675 F.2d 129, 140 (7th Cir. 1982) (Swygert, J., dissenting).

57 *Elsoffer*, 671 F.2d at 1297. The dissenters in *Mendenhall* also recognized this point saying "[i]t is doubtful that any reasonable person about to board a plane would feel free to leave when law enforcement officers have her plane ticket." *Mendenhall*, 446 U.S. at 570 n.3. (White J., dissenting).

58 See generally *United States v. Fry*, 622 F.2d 1218 (5th Cir. 1980).

59 *Berry*, 670 F.2d at 597, 603 n.26.

port stop cases.⁶⁰ Courts take a hard look at this situation because production of personal papers is so intrusive into personal liberty. While a mere request for identification is not a seizure, any coercive conduct in the request for or retention of the document will tip the fourth amendment balance toward personal liberty and away from the government's drug enforcement interest.⁶¹

III. An Evaluation of the Seizure Concept

The reasonable person standard from *Mendenhall* has provided the mechanism, the theoretical scale, by which the courts weigh the relevant values in airport police-citizen encounters.⁶² As they have struggled in applying the reasonable person test to various unique fact situations, however, the courts have striven to objectify the test.⁶³ The courts' evaluations of the airport seizure cases reveal the evolution of discrete categories of seizure and non-seizure circumstances. Indeed, the federal courts have made the seizure determinations in recent airport encounter cases in a surprisingly uniform manner.⁶⁴

60 See generally *Berry*, 670 F.2d 583; *Elsoffer*, 671 F.2d 1294; *Elmore*, 595 F.2d 1036; *Black*, 675 F.2d 129; *Viegas*, 639 F.2d 42.

61 *Berry*, 670 F.2d at 597.

62 Some state courts have adopted standards for seizure determinations different from Stewart's reasonable person test in *Mendenhall*. For example, see *In re Tony C.*, 21 Cal. 3d 888, 582 P.2d 957, 148 Cal. Rptr. 366 (Cal. 1978) in which the Supreme Court of California looked to the purpose for which the officer approached the citizen. If the encounter was initiated because the officer suspected the citizen of criminal activity, then a seizure has occurred and the officer must provide objective justification for his actions. New York courts have applied an intricate "sliding scale" of justification to all levels of police-citizen encounters. See *People v. DeBour*, 40 N.Y.2d 210, 352 N.E.2d 562, 386 N.Y.S.2d 375 (N.Y. 1976). Nevertheless, the scope of this recent decisions piece has been confined to the seizure determination process in the federal judicial system.

63 Professor LaFave advocates a practical application of the reasonable person test. See note 67 *infra* and accompanying text. LaFave concludes that an objective test is the best approach for seizure determinations. He reaches this conclusion after rejecting the available alternatives of a "perception-of-the-suspect test," a test which characterizes all police-citizen encounters as seizures except those "where the citizen has consented to the confrontation," and a test which focuses "upon the intention of the officer involved in the street encounter." See W. LaFave, *supra* note 45, § 9.2. Professor LaFave later noted that the objective test he advocated was subsequently adopted by Justice Stewart in *Mendenhall*. *Id.* at § 9.2 (1978 & Supp. 1982).

64 Of course, the seizure determinations by the courts have not been unanimous. As with any standard, particularly in its developing stages, reasonable judges can and do differ when they attempt to apply the standard to a set of facts. For example, in *Mendenhall*, Justice Powell characterized as "extremely close" the issue of whether the defendant was seized when two government agents asked for her driver's license. 446 U.S. at 560 n.1 (Powell J., concurring). The dissenters would have looked to additional "objective facts" which, in their view, were vital to the seizure determination and which they maintained Justices Stewart and Rehnquist had overlooked. 446 U.S. at 570 (White J., dissenting). See also Judge Swygert's

The chief criticism of the federal courts' use of the reasonable person standard results from the critics' literal reading and application of the test.⁶⁵ After establishing that average, reasonable citizens feel naturally compelled to cooperate with (or at the very least to respond to) inquiring police officers, critics conclude that virtually all police-citizen encounters are seizures within the meaning of the Stewart analysis.⁶⁶ Although the reasonable person standard could be so literally applied, the courts have not been receptive to this criticism. Instead, they have recognized that effective law enforcement necessitates police contact with the citizenry, and have applied the reasonable person test accordingly.

In short, the federal courts have used the reasonable person balancing process, but their scales have not been entirely true. Judicial recognition of weighty government interests frequently prevails in airport narcotics cases. This recognition has in turn influenced the manner in which the courts have applied the reasonable person test. The courts have generally disregarded the factor of compulsion to cooperate which is inherent in all interactions between police and citizens. They have then attempted to objectively evaluate the other circumstances of each case to determine whether "the officers added to those inherent pressures by engaging in menacing conduct significantly beyond that which is accepted in social conduct."⁶⁷

Disregarding the citizen's natural compulsion to cooperate with a DEA agent, the courts ask whether an objective, reasonable person,

dissenting opinion in *Black*, 675 F.2d at 138, for criticism of both the reasonable person test ("[a]n overly-restrictive definition of a seizure isolates police-citizen contacts from constitutional safeguards by removing them from judicial scrutiny") and the majority's application of the test in the *Black* decision.

65 Professor LaFave observed that if the courts were to say that a police-citizen encounter is a seizure unless "a reasonably prudent person would believe he was free to go," a realistic application of this standard "would seem to put the great majority of street encounters into the seizure category, for when confronted by a policeman 'the average person encountered will feel obligated to stop and respond.'" W. LAFAVE, *supra* note 45, § 9.2 (citations omitted).

66 See generally Note, *Reformulating Seizures—Airport Drug Stops and the Fourth Amendment*, 69 CALIF. L. REV. 1486 (1981); Note, *Drug Courier Profile Stops and the Fourth Amendment: Is the Supreme Court's Case of Confusion in its Terminal Stage?* 15 SUFFOLK U. L. REV. 216 (1981).

67 W. LAFAVE, *supra* note 45, § 9.2. Expounding upon the justification underlying the courts' more practical reading of the reasonable person test, LaFave points out that the moral and instinctive pressures on citizens to cooperate with the police are not inherently bad. He maintains that citizen-police encounters should not be deemed fourth amendment seizures merely because citizens have responded to those pressures. Rather, the critical inquiry should be "whether the policeman, although perhaps making inquiries which a private citizen would not be expected to make, has otherwise conducted himself in a manner consistent with what could be viewed as a nonoffensive contact if it occurred between two ordinary citizens." *Id.* at § 9.2 (1978 & Supp. 1982) (citations omitted).

who is not carrying illegal drugs on his person and who has committed no felonies, under the circumstances of the particular encounter would feel that he was free to leave when approached by the officer. If he would not, then the citizen was seized. The seizure is illegal if the officer cannot provide *Terry* justification for the seizure.⁶⁸ Courts have created some confusion by stating the reasonable person test and then implicitly, rather than explicitly, applying the test in this practical manner.

Although federal courts have not always been frank regarding the accuracy of the scales they employ, their various balancing processes have resulted in seizure determinations which are basically consistent. Of course, uniformity in the application of the reasonable person standard is a chimeric goal, given the myriad of fact situations to which it might be applied. Nevertheless, the reasonable person standard is becoming clearer and more objective with each seizure determination the courts make. As the federal courts continue to hear airport encounter cases, the reasonable person standard will become more sharply defined and the seizure/non-seizure division will be more clearly delineated.

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Addendum

As this piece was going to press, the Supreme Court decided State v. Royer, 51 U.S.L.W. 4293 (U.S. Mar. 23, 1983) (No. 80-2146). The plurality opinion written by Justice White and joined in by Justices Marshall, Powell and Stevens, supports the Courts of Appeals' seizure determination process discussed above. The opinion stated that the officers' initial approach and questioning of Royer was constitutionally permissible, that the officers had effectively "seized" Royer when they asked him to accompany them to the interrogation room while still retaining his travel documents, but that the officers had articulable suspicion for the seizure. However, the plurality opinion asserted

68 LaFave explains that this practical application of the objective reasonable person test strikes an appropriate balance between government and fourth amendment interests.

Police would remain free to seek cooperation from citizens on the street without being called upon to articulate a certain level of suspicion in justification if a particular encounter proved fruitful, but yet the public would be protected from any coercion other than that which is inherent in a police-citizen encounter.

W. LaFAVE, *supra*, note 45, § 9.2. LaFave maintains that this method of a seizure determination process is in harmony with fourth amendment precedent.

that by the time the officers requested the key to Royer's suitcase, the seizure had escalated into a practical arrest, unsupported by probable cause. *Id.* at 4296. Thus, the Court affirmed the Florida Court of Appeal's reversal of Royer's conviction. See note 26 *supra*. Significantly, although the opinion used the language of Justice Stewart's test in *Mendenhall*, the plurality nevertheless refused to "suggest that there is a litmus-paper test for distinguishing a consensual encounter from a seizure or for determining when a seizure exceeds the bounds of an investigative stop." *Id.* at 4297.

Justice Brennan concurred in the result but disagreed with the plurality's assessment that the initial stop of Royer was legal, maintaining that Royer was impermissibly seized when asked to produce his ticket and identification. *Id.* at 4298.

Justice Rehnquist dissented in an opinion which the Chief Justice and Justice O'Connor joined. Justice Rehnquist stressed the "reasonableness" of the policemen's conduct at all stages of the encounter. In a separate dissent, Justice Blackmun emphasized the significance of the law enforcement interests in this particular fourth amendment balance.